

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**NOTICE OF FILING TRANSCRIPT OF MOTIONS HEARING OF
JANUARY 5, 2021**

COMES NOW THE PLAINTIFF and respectfully files the transcript of the hearing on January 5, 2021 attached hereto as **Exhibit “A.”**

Respectfully submitted, this 7th day of January, 2021.

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2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF GEORGIA
4 ATLANTA DIVISION

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DONALD J. TRUMP, in his)
capacity as a candidate for)
President of the United States,)
)
 Plaintiff,)
) DOCKET NO. 1:20-CV-5310-MHC
-vs-)
)
BRIAN P. KEMP, in his official)
capacity as Governor of the)
State of Georgia; BRAD)
RAFFENSPERGER, in his official)
capacity as Georgia Secretary)
of State,)
)
 Defendant.)

TRANSCRIPT OF MOTION PROCEEDINGS BEFORE
THE HONORABLE MARK H. COHEN
UNITED STATES DISTRICT JUDGE
TUESDAY, JANUARY 5, 2021

VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFF:

3 KURT ROBERT HILBERT, ESQ.
4 THE HILBERT LAW FIRM, LLC

5 JOHN EASTMAN, ESQ.

6 ON BEHALF OF THE DEFENDANTS:

7 RUSSELL D. WILLARD, ESQ.
8 -and-

CHARLENE S. McGOWAN, ESQ.
9 Office of the Attorney General

10 CHRISTOPHER S. ANULEWICZ, ESQ.
11 -and-

JAMES L. HOLLIS, ESQ.
BALCH & BINGHAM LLP

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1 (JANUARY 5, 2021)

2 (PROCEEDINGS HELD IN OPEN COURT AND VIA ZOOM AT 9:30 a.m.)

3 THE COURT: All right. This is the case of Donald J.
4 Trump versus Brian P. Kemp and Brad Raffensperger, Civil Action
5 20-CV-5310.

6 Will counsel for the parties please identify themselves
7 for the record beginning with the plaintiff.

8 MR. HILBERT: Good morning, Your Honor. This is
9 attorney Kurt Hilbert of the Hilbert Law Firm, and I represent the
10 plaintiff, the President of the United States.

11 THE COURT: Good morning, Mr. Hilbert.

12 MR. HILBERT: Good morning.

13 MR. EASTMAN: Good morning, Your Honor. This is John
14 Eastman. I represent the plaintiff. My pro hac vice application
15 is pending.

16 THE COURT: Good morning, Mr. Eastman.

17 All right, who is here on behalf of the defendants?

18 MR. ANULEWICZ: Your Honor, this is Chris Anulewicz.
19 I'm one of the lawyers on behalf of the defendants.

20 THE COURT: Good morning, Mr. Anulewicz.

21 MR. ANULEWICZ: Good morning, Judge.

22 MR. HOLLIS: Your Honor, this is James L. Hollis also on
23 behalf of the defendants.

24 THE COURT: Good morning, Mr. Hollis.

25 MR. WILLARD: Good morning, Your Honor, this is Russ

1 Willard from the Attorney General's office here on behalf of the
2 state defendants.

3 THE COURT: Good morning, Mr. Willard.

4 MR. HILBERT: Good morning, Your Honor. This is
5 Charlene McGowan, also with the Attorney General's office on
6 behalf of the state defendants.

7 THE COURT: And good morning to you, Ms. McGowan.

8 All right, this is an argument which the Court expedited
9 on plaintiff's motion for expedited declaratory and injunctive
10 relief. Before we get started, I wanted to state for the record
11 that as counsel was probably not surprised to hear, we had a lot
12 of calls this morning from members of the public that want to know
13 why we couldn't audio in via the Internet on this case, and as
14 I -- we informed counsel for the parties yesterday, the court does
15 have a pilot project which allows live streaming of cases of
16 public interest through audio through the Internet, but one of the
17 prerequisites of that project is that all the parties have to
18 agree to have that done. And because counsel for plaintiff did
19 not agree to have that done, we did not put this out for audio
20 live streaming. So I wanted to make that clear for the record,
21 and that is what we are informing members of the public who call
22 up that ask why we can't see this over the Internet. So I wanted
23 to make that clear to everyone.

24 All right. Mr. Hilbert, I assume you're going to begin
25 the arguments. So you can go forward.

1 MR. HILBERT: Thank you, Your Honor. May it please the
2 Court, it is our honor and privilege to represent the President of
3 the United States in this matter. I am here, as you know, with
4 co-counsel Professor John Eastman. He's a constitutional law
5 scholar, who is also private counsel to the President. He will be
6 sharing in the presentation today and will be bifurcating what we
7 argue for the Court.

8 I want to personally thank the Court for setting this
9 hearing this morning as this hearing is extremely important to the
10 democratic process, our fundamental voting rights, our election
11 process, upholding the rule of law and the Constitution itself.

12 It is my understanding that this hearing today is on the
13 President's motion for temporary restraining order and preliminary
14 injunctive relief under Federal Rules of Procedures 65 and that is
15 the status and quote injunction, and if granted by this Honorable
16 Court, a full permanent injunction and declaratory judgment
17 hearing will take place at a later date.

18 We are requesting at this time a consolidation of the
19 TRO portion with also the preliminary hearing portion of the
20 hearing and our motion under 65. We have extensively agreed to
21 this matter so the Court can rely on the verified complaint which
22 is evidence for purposes of this hearing today.

23 THE COURT: Mr. Hilbert, let me just say for the record,
24 I have reviewed everything that has been filed in this case both
25 from the plaintiff's side and from the defendant's side, so...

1 MR. HILBERT: Thank you, Your Honor. We believe we have
2 made our prima facie case on the face of the verified complaint
3 and the relief sought under the Georgia Election Code. I want to
4 emphasize and point out and focus on the oral argument here today
5 that the defendants filed last evening and ostensibly tried (audio
6 disruption) each of the arguments that we wrote with no merit
7 whatsoever, and emphasize how the briefing glaringly downplays the
8 unconstitutional settlement entered into by Defendant
9 Raffensperger that ostensibly put all of this -- problem that we
10 are here before the Court in place.

11 THE COURT: Has it -- let me interrupt you, Mr. Hilbert.
12 The issue of the settlement agreement, this case has been decided
13 by one of my colleagues, Wood versus Raffensperger, which
14 considered a challenge to the settlement agreement under the
15 theory that the Secretary of State, you know, usurped the power of
16 the General Assembly in entering into that -- entering into that
17 settlement agreement. Judge Grimberg found that that was not the
18 case and the fact Secretary Raffensperger was acting in a valid
19 manner pursuant to delegation that he's given as -- in his
20 capacity as chief state election office -- officer. So why should
21 I basically review this matter?

22 And let me also ask you this question, because it
23 is -- it is pervasive through, I think, a procedural problem you
24 have in coming to me at this late date. And that is, why now?
25 This settlement agreement I believe was entered into back in March

1 of last year, which is, what, nine months ago and you wait
2 until -- I don't even know if it's the eleventh hour or even
3 beyond the eleventh hour to come to this court to challenge the
4 settlement agreement which has been in place for months. I mean,
5 the plaintiff could have challenged that agreement the week after
6 it was entered. Certainly, in -- in a large period of time
7 between the time it was entered and now. So I've got a situation
8 where you sat on your rights with respect to challenging the
9 agreement, plus the very argument you're making has been rejected
10 by another Court in this district. So convince me why those two
11 factors basically would not lead me to reject your argument.

12 MR. HILBERT: No, Your Honor. Thank you for the
13 opportunity. There's a lot in there and I'll try to unpack it all
14 as I go here, specifically as to the settlement agreement. First
15 and foremost, that -- the Wood versus Raffensperger case, they
16 were different parties. The President of the United States is the
17 actual candidate here in this case. He was not a part of that
18 case.

19 THE COURT: Well, I -- let me interrupt you. I know he
20 wasn't a part of that case, and, you know, one of the alternative
21 holdings of that case had to deal with standing and I understand
22 that. But Judge Grimberg went to the merits of the matter. He
23 basically said, I assume that everyone's got standing to challenge
24 this, and even if they do, their challenge falls. So just because
25 we have a different plaintiff, we have the exact same argument

1 that was decided by another judge of this district. So convince
2 me why Judge Grimberg was wrong.

3 MR. HILBERT: Okay. So Judge Grimberg was indeed wrong
4 on multiple levels. First of all, this was an absolute arrogation
5 of the Legislature under Georgia law, first of all. The Secretary
6 of State is imbued with overseeing the elections. He's not imbued
7 with the authority to add law to the existing code. This
8 settlement agreement on its face alters the law. It is at void ab
9 initio as a matter of law and can be challenged at any time by any
10 party at any time. That's why the argument fails. That's why the
11 mootness argument fails. This argument was not raised for the
12 court in front of Judge Grimberg. The issue of the state law of
13 O.C.G.A. 13-8-2 which is -- are void as a matter of public policy
14 statute under Georgia law specifically says under the first
15 section of that statute that any contract tending to corrupt
16 legislation is void as a matter of law and public policy. That is
17 the declared policy of the State of Georgia. That argument was
18 not presented or put before the Court in any capacity.

19 The Court then further said, well, this was just a
20 natural extension of delegation of his powers as Secretary of
21 State. I respectfully disagree with Judge Grimberg because this
22 is a separation of powers issue. He is an executive with the
23 Executive Branch of the government. He's not part of the
24 Legislature and he cannot dictate new law through a private
25 settlement agreement. This is a contract under Georgia law that

1 is void ab initio and can be attacked collaterally at any time and
2 at any point in time that -- that we decide that it needs to be
3 challenged. The fact that it has been in place for months since
4 March 2020 is an irrelevant argument. It is void ab initio. It
5 is a nullity. It is unconstitutional. And for the Court to have
6 said that this was somehow an extension of authority of the
7 Secretary of State is just simply a flawed analysis. It's wrong
8 on the law. This is void as a matter of public policy because it
9 tended to corrupt state legislation. And when it tends to
10 corrupt, it does not even have to actually corrupt, it just has to
11 tend to corrupt. But what we have shown in our verified complaint
12 and throughout this entire 2020 general election, is that we
13 actually have corruption in fact.

14 The other part that was not raised before Judge Grimberg
15 is an extremely important factor, the Georgia Election Code. The
16 extension of authority of the Secretary of State, they left out
17 one critical part of their analysis in their argument, and that is
18 the Secretary of State still has to act consistent with existing
19 law. That's in the election code itself. The acting consistent
20 with the existing law, he did not do that. He entered into a
21 private settlement agreement with the Democratic party, the GOP
22 was not a party, the Libertarian party was not a party. Under
23 Georgia law it is abundantly clear, and we cited this in our
24 briefing, that non-parties to a settlement agreement cannot be
25 bound to its terms, and it can be challenged at any time. The

1 statute of limitation for a contract challenge under Georgia law
2 is six years. A fraud challenge is four years. We are well
3 within the statute of limitations on a simple contract analysis or
4 a fraudulent inducement analysis.

5 THE COURT: But you're coming to this Court -- it's not
6 just you're challenging an agreement that you want in the future
7 not to be enforced; you're basically using this eleventh hour
8 challenge to a settlement agreement as one of your arguments for
9 this Court to take the absolutely extraordinary action to
10 basically stop -- stop the results of an election. So that -- I
11 mean, it's interesting. The one case that you created in your
12 brief, which I think is the Carson --

13 MR. HILBERT: Yes.

14 THE COURT: -- case in which there was a challenge to a
15 settlement agreement, it's not binding on me. It's another
16 circuit obviously. But you know what's interesting about that
17 case, they brought the challenge a month or more before the
18 election. So the Court actually when it made its decision was not
19 overturning the results of an election. It was before the
20 election ever took place. What was the reason if the settlement
21 agreement was such a horrible agreement that was entered that you
22 didn't come forward well before now to challenge it? In fact,
23 before the election. Why couldn't you have come forward before
24 the election to challenge it?

25 MR. HILBERT: The simple answer to that question, Your

1 Honor, is that we didn't know what the results of the election
2 were until after the election occurred.

3 THE COURT: Ahh, so now we get to the -- now we get to
4 the bottom line. The agreement's only illegal if the election
5 doesn't turn out your way. If the election turns out your way,
6 then you're fine with the agreement, right?

7 MR. HILBERT: No, Your Honor. That is not -- that is
8 not the case at all. It is void ab initio because it was an
9 illegal arrogation of power from the Legislature.

10 THE COURT: Okay. And why not, because it's in your
11 view an illegal agreement before the election, get the thing
12 thrown out so that it is not implemented during the election?

13 MR. HILBERT: We don't have to, Your Honor. A void --

14 THE COURT: I know you -- but why -- you're not
15 answering my question. Why did you not? Because if your argument
16 is that this agreement is illegal and beyond the authority of the
17 Secretary of State, why allow an election to go forward under an
18 agreement that's illegal? What I hear you saying is we didn't
19 know what the results were going to be.

20 MR. HILBERT: Your Honor, again it has to be consistent
21 with existing law. And until that happens it has -- it has to be
22 consistent with existing law. And the law that -- we're under an
23 election contest here and that election contest has to happen
24 after the election actually takes place. So it does --

25 THE COURT: The challenge to the agreement -- the

1 challenge -- excuse me, Mr. Hilbert. The challenge to the
2 agreement has nothing to do with following an election contest.
3 You could have challenged the agreement independently of any
4 election contest. That's -- that's my point. If the agreement is
5 void ab initio, it can't be carried out, but it was carried out
6 because nobody filed any action in an attempt or you -- I'm not
7 going to say nobody. I don't know what happened before. But I'm
8 saying you on behalf of your client did not file an action before.
9 And I don't want to -- I mean, I'm beating a dead horse here, but
10 it's an important horse because it leads to the next issue.

11 And that is, your attempt to ultimately remove an
12 election challenge that's been filed in the Superior Court of
13 Fulton County to this court with literally days left before you
14 think the world is going to come to an end. So let me ask you
15 this because this is an important -- an important thing to talk
16 about.

17 As I read your complaint, the thing that you got in
18 terms of dissatisfaction with the Superior Court of Fulton County
19 is that you believe the Superior Court has, basically, prevented
20 you from having the election contest decided in time enough so
21 that you can take action before Congress meets tomorrow. I mean,
22 that's how I perceive what your complaint is. But the truth of
23 the matter is, you filed the election -- well, you filed the
24 election challenge on December 4; is that correct? I think I have
25 my dates correct.

1 MR. HILBERT: That's correct, Your Honor.

2 THE COURT: And I know the state brings up an issue that
3 the filing fee wasn't paid right away and you had to pay the
4 filing fee. But follow these steps with me. The election
5 challenge could have been filed, obviously, the day after
6 Secretary Raffensperger certified the election results on November
7 20th, 2020. In fact, the election challenge is supposed to be
8 filed within five days of the certification. You waited -- let me
9 finish, and I'll give you plenty of time to respond to this. But
10 I want to get all of this out, so I don't interrupt you in the
11 middle.

12 So November 21st is the first day you could have filed
13 the election challenge. You chose obviously to request a recount
14 which is your right after the Secretary of State had already done
15 one recount, and you chose to wait until after or close to when
16 that recount was finished to file your election contest. All
17 right. That was a legal strategy that you chose, but you lost two
18 weeks between the 21st and the 4th to file an election challenge.
19 Then you filed a motion to have the Superior Court consider it on
20 an expedited basis. And then you immediately withdrew that
21 motion. I think the motion was filed on the 7th or the 8th of
22 December and then the withdrawal occurred maybe -- I think the
23 motion was filed on the 7th, the withdrawal occurred on the 8th.

24 So right after the withdrawal occurs, Judge Russell
25 basically says well, they've withdrawn their request for expedited

1 review of this matter, so I don't have to do it on an expedited
2 basis. I can treat this in the regular course of proceedings, and
3 she entered an order that basically said that. Well, after she
4 entered that order on December 10th, you decided to do two things.
5 Number one is, you filed a second motion for expedited review, but
6 you also filed a notice of appeal to the Supreme Court appealing
7 her procedural order. That stopped everything because the case
8 was appealed to the Supreme Court of Georgia. So the Superior
9 Court of Fulton County didn't have any jurisdiction anymore to
10 consider your renewed efforts to expedite your appeal.

11 You then go to the Supreme Court of Georgia, you try to
12 get them to do an emergency writ of certiorari. They deny you the
13 next day on the 12th of December. I think I have my dates right.
14 And then from the 12th of December until the 29th of December,
15 that's a 17-day period, you did nothing. You did nothing
16 and -- and I understand the reason you probably did nothing is you
17 had a pending notice of appeal that was still pending in the
18 Supreme Court of Georgia. And then Chief Judge Brasher, who
19 realized you still had a motion to expedite that couldn't be taken
20 up because you had a notice of appeal filed, did an order that
21 kind of reminded plaintiffs, look, if you want us to take this up
22 on an expedited basis, you can't pursue your appeal. You have to
23 withdraw it. You need to make a decision. And then you decided
24 the next day, the 30th of December to withdraw your notice of
25 appeal and then right after you did that, the Superior Court acted

1 expeditiously, they got a judge from outside the district pursuant
2 to your request to consider the election contest, and it's Judge
3 Grubbs and she set a hearing for this week. So they acted as
4 quickly as they could after you finally withdraw your notice of
5 appeal.

6 You decided as a matter of legal strategy you'd rather
7 be in the Supreme Court of Georgia. That's a strategy. But when
8 you do that strategy, you give up your right to have the case
9 heard in the lower court. So let me go back.

10 There's two weeks between November 20th and December 4th
11 when you filed your election contest. There's another 17 days
12 between your notice of appeal and the time you withdrew your
13 notice of appeal. That's a month. That's a month. That's about
14 75 percent of the time from the date of the certification of the
15 election results until you filed the case in this court.

16 So my problem is, obviously, that you come to me at the
17 last minute, you had more than sufficient opportunity in the
18 Fulton Superior Court to get a hearing before now. You probably
19 would have gotten it resolved and you probably -- if you had not
20 wanted the Superior Court, you would have been up at the Supreme
21 Court by now. So that's -- that's your doing. That's not
22 anything that anyone else did. Go ahead and comment on it.

23 MR. HILBERT: Okay. Let me back up and explain where
24 that analysis is a little -- little flawed. First of all, I want
25 to go back to the previous argument that you brought up during --

1 the Secretary of State. The Secretary of State himself said that
2 that settlement agreement was consistent with existing election
3 law. We did not know that that was a lie until after (audio
4 disruption). I just want to make that clear for the record. The
5 Secretary of State himself said that that settlement agreement was
6 consistent with law and we did not know that it was not consistent
7 with law until we realized after the election that hundreds of
8 thousands of illegal votes took place in this state.

9 All right. Now as to your procedural arguments and
10 issues. Let me address all of those.

11 First of all, there were three separate certifications
12 by the Secretary of State, all of which had different numbers.
13 The reason why we had to wait after the third certification to
14 challenge it, which we promptly did within five days under the
15 state election code, was because we didn't know what the real
16 number was until the third certification came out from the
17 Secretary of State. The very fact that there were three different
18 numbers shows that the process was flawed to begin with.

19 THE COURT: Well, let me -- I hate -- I have to
20 interrupt, but here's the thing. You could have, could you have
21 not, filed an election contest after the -- I think it's actually
22 the second certification because they actually did a hand count
23 before the first certification. So I mean, there was -- it was a
24 first recount, if you were, before the Secretary of State
25 certified the election results. So could you have not under

1 Georgia law filed an election contest after that certification was
2 done on November 20th, yes or no?

3 MR. HILBERT: The answer to that is yes, with the caveat
4 that that was a risk-limiting audit. It was not true signature
5 match. It was not true, you know, verification of illegal votes
6 that had been counted in this election. The type of
7 certifications that took place were different throughout all three
8 of them, but to answer your question --

9 THE COURT: But Mr. Hilbert, do you agree -- Mr.
10 Hilbert, do you agree that that was the certification that the
11 Secretary of State was required to do within 17 days of the date
12 of the election? That was the statutory certification that he was
13 required to perform and he performed it. And you had the right to
14 file an election contest right after that was done, true or false?

15 MR. HILBERT: True. I'm not --

16 THE COURT: All right.

17 MR. HILBERT: -- going to dispute that.

18 THE COURT: I understand and you determined you just
19 chose -- you just chose not to because you wanted to wait for the
20 next certification to be done. And -- and again, that's a legal
21 strategy. I get that. But at that point, you knew that the
22 certification was that Joe Biden won by a certain number of votes,
23 and if history proves, you know, what we go by, you know, we have
24 seen in hundreds of election contests that when you got the number
25 of votes separated between the first and second place people when

1 they do these recounts, it doesn't change in the thousands and
2 tens of thousands; it changes, you know, 1,000 or 1,500 or a
3 hundred or whatever. But you decided -- you decided and it was a
4 legal decision and I'm not -- I'm not faulting you for that.
5 That's a legal decision that you made. But -- but it was the
6 decision knowing that you were risking that 14 days of time that
7 you took up by not filing that election contest which took that 14
8 days away from the Superior Court to be able to resolve your
9 election contest.

10 MR. HILBERT: But let me answer you, Your Honor.

11 THE COURT: Okay. Go ahead. Go ahead.

12 MR. HILBERT: So first of all, the election code allows
13 us -- it's almost like a civil code. It doesn't have -- it
14 doesn't even mention laches. It doesn't mention anything else.
15 It's a civil code and allows us to do it in five days. So for us
16 to say that it could have been done then or now, we have the
17 statutory obligation and remedy to file it when we did.

18 But to get into your point about the legal strategy of
19 what happened in the state court. Let me address that for a
20 moment. In our original petition, the first thing that we
21 requested in our prayer for relief was for the immediate
22 appointment of an administrative judge. That was on December 4th.
23 It is not the obligation of my -- me as counsel or my co-counsel
24 in that state court action to inform the Court of its job to
25 independently look at the pleading and actually realize that this

1 is an election contest and appoint a judge in a timely manner.
2 That was done on December 4th. The Court had knowledge, the Clerk
3 of Court had knowledge, the Clerk under the election code
4 specifically was required to give notice. That didn't happen.

5 Now, let's get to the -- to the procedural issue of --
6 that you brought up regarding the order that was entered by Judge
7 Constance Russell who is a dear friend of mine. She was illegally
8 appointed. She had no eligibility to preside over this case under
9 the election code. She was an acting judge and she resided in the
10 county. Under the election code, she had no authority to enter an
11 order at all. It was a nullity. That order -- we were left with
12 no choice but to try to appeal that order because it completely
13 shut down the case. There was nothing literally legally or
14 procedurally that we could do to file with the Court to say, wait
15 a minute, Your Honor, that order that you illegally entered
16 because you have no lawful right to preside over this case, must
17 be vacated. She could do nothing.

18 And, in fact, Judge Russell called me on the phone and
19 specifically told me, I don't think I can do anything further in
20 this case. It was that -- upon that reliance of what she said to
21 me that we had to take the extraordinary relief to go up to the
22 Georgia Supreme Court to get them to try to do their duty to
23 nullify that order, so that we could proceed in an expedited
24 fashion.

25 THE COURT: But -- but you were unsuccessful. The

1 Supreme Court turned you down within a day; right?

2 MR. HILBERT: They think that it was a non-final order.

3 We argued it was a nullity on its face; and, therefore, the Court
4 had no ability to stop the procedure of this case.

5 THE COURT: Okay. And at that point you knew that the
6 Georgia Supreme Court was not going to give you an expedited
7 hearing on this. That was done. So at that point you had to make
8 a decision and that is, well, do we stick with the notice of
9 appeal knowing as you well know as an experienced attorney, that
10 nothing is going to happen fast. When you got a notice of appeal
11 pending and the appellate court has denied your ability to take it
12 up on expedited basis. So you had to determine at that point
13 well, do we maintain the notice of appeal or not? Did you go back
14 to the Superior Court and beg, you know, oh, my God, we need to
15 have a hearing tomorrow, now that we've been turned aside? And,
16 no, you didn't do anything. And it wasn't until Judge Brasher
17 issued his order that basically said, hey, you know, I'm ready to
18 appoint someone else to hear your election contest case, but
19 you've still got your notice of appeal pending, what do you want
20 me to do?

21 MR. HILBERT: I disagree, Your Honor. We did do
22 something. We gave notice to the Court. We filed notices on the
23 record with the Superior Court to appoint the judge, and also for
24 the Clerk to do its duty. But what the Court also is not
25 mentioning is the first order that was entered by Judge Brasher

1 that delayed five days in order to raise objections to the
2 appointment of a judge.

3 THE COURT: But so why? At that point you had filed a
4 notice of appeal. So what?

5 MR. HILBERT: Well, no, no, no, no. He -- I believe he
6 filed that previous -- if I'm correct, and I might be mistaken on
7 that.

8 THE COURT: He filed it on the 11th of December; right?

9 MR. HILBERT: Well, regardless --

10 THE COURT: You filed a notice of appeal on the 11th of
11 December, so...

12 MR. HILBERT: I know. It was the timing of getting it
13 to the Court and when it occurred and so on and so forth. We were
14 left with no opportunity to proceed with the case at that point.
15 And then even when that five-day period went by and no objections
16 were raised, a judge was not appointed at the end of that day.
17 The judge -- that order from the Superior Court is a nullity.
18 It's arguable that the Superior Court still had jurisdiction to
19 enter an order in that case, because it was an absolute nullity.

20 THE COURT: All right. Go ahead.

21 MR. HILBERT: All right, Your Honor. I also want -- I
22 want to get to -- further on the issues of the brief that the
23 defendants filed last evening. They failed entirely to cite the
24 Carson v. Simon case from the 8th Circuit, the 7th Circuit
25 decision, Wisconsin case, they didn't even address that as well.

1 And they also relied on De La Fuente, which is an unpublished
2 opinion and has no binding authority in the case. Also, Allen v.
3 Wright, that has been distinguished as well, and they didn't
4 inform the Court of that.

5 When it gets to the four-prong test for the temporary
6 restraining order and preliminary injunction, the first prong is a
7 substantial likelihood of success on the merits. And I want to
8 point out, we briefed this again in our pleadings and such, but I
9 want to point out a specific code section from the Georgia Code,
10 it's O.C.G.A. 21-2-524(c), and that, basically, says an absolute
11 right of the President or an aggrieved voter, as well, or an
12 aggrieved elector to challenge the election contest and demand a
13 recount. And what's interesting about this particular code
14 section, is it specifically provides in the code section that no
15 evidence is required to even be pled for that relief to be given.

16 So it's our position, Your Honor, that under the Georgia
17 Election Code, which again is the arrogation of common law in
18 (audio disruption), there's almost a presumption of success on the
19 merits as regarding that particular claim.

20 We have Gabriel Sterling who is an agent of the
21 Secretary of State who has come out and said on behalf of himself
22 and the office that he admits that illegal voting took place. So
23 we believe that there is going to be a substantial likelihood of
24 success on the merits of basically all of our claims once we're
25 able to actually have a hearing on the merits of -- in the lower

1 case.

2 Now, you mentioned earlier also that a trial has been
3 set on January 8th. That is of significant import because,
4 obviously, January 6th Congress is meeting to open votes. A
5 hearing on January 8th means nothing. It ostensibly moots the
6 entire election contest. Therefore, we have irreparable harm, we
7 have immediate necessity for a hearing today (audio disruption).

8 THE COURT: And I've given you that hearing. But what
9 you're asking me to do is to take the unprecedented action of
10 decertifying an election.

11 MR. HILBERT: Correct, Your Honor.

12 THE COURT: Let me tell -- let me tell you something.
13 There is one remedy at this point. The Secretary of State has
14 done what is required to do of him. And that is, he certified the
15 election results under 21-2-499(b), I believe it is. The Governor
16 then did what is required of him and that is, he's got one job to
17 do. And that is once the Secretary of State certifies the
18 election results, he sees who won, you know, who got the most
19 votes and then he certifies the presidential electors.

20 The remedy for doing something with respect to objecting
21 to those electors is a single remedy. It's a federal law. It's
22 in 3 U.S. Code, Section 15. And that remedy lies exclusively with
23 the Congress of the United States. And as we know from what we
24 have read there are people in Congress that are going to pursue
25 that remedy, and that is, you know, once the President of the

1 Senate announces the electoral votes for each state, one senator
2 and one house member have the right to object to those votes being
3 accepted. There's a provision in the statute for a debate to
4 occur in each of the bodies, and there's a vote in each of the
5 bodies as to whether or not to accept those electors. Am I
6 correct about that?

7 MR. HILBERT: You're correct about the process, but I
8 don't think you're correct --

9 THE COURT: Name me -- name me -- name me any authority
10 that says that a district judge has the right to step in and usurp
11 the authority of the Congress of the United States and decertify
12 the electors that have been certified in -- by the State of
13 Georgia in this case. Because you talk about, you know, people
14 talk about activist judges. I cannot think of a more activist
15 thing for a judge to do than to basically cross the line into
16 another branch of government that has the authority and the sole
17 authority once the state certifies its electors to basically not
18 accept those electors. Give me some authority, give me any
19 authority.

20 MR. HILBERT: I'm going to give you the authority, Your
21 Honor. I respectfully disagree with the analysis, because, first
22 of all, the Secretary of State certainly had a duty to count. And
23 he did his duty to count. But what he didn't do was he counted
24 illegal votes.

25 THE COURT: And that's what election -- and that's what

1 election contests are for and that's -- wait a minute. And that's
2 what you filed. That's the procedure to challenge the
3 certification is to file the election contest, which you did, and
4 you just, you know, didn't do it expeditiously enough and now
5 you're -- you -- you have set this date of tomorrow as the
6 drop-dead date which, you know, you could have gotten this
7 resolved beforehand, but you didn't.

8 But here's -- here's the thing about that drop-dead
9 date. Mr. Hilbert, let me finish. Here is the thing about that
10 drop-dead date and that is, that is the drop-dead date for
11 Congress to do its job. That's what that is. So, you know, the
12 last remedy that there is for the plaintiff is for Congress to not
13 accept enough states to change the total electoral votes. That's
14 his last remedy, because the election contest was not decided by
15 Fulton Superior Court in time, possibly to alter that. And that's
16 not the fault of the Fulton Superior Court, as you've alleged. So
17 that's the problem that you've got here with me taking what would
18 be an absolutely unprecedented action.

19 MR. HILBERT: Let me give you the legal authority, Your
20 Honor, first under both state law and federal law. The first is
21 O.C.G.A. 21-2-525, where the election code again which is in
22 derogation of common laws which says the court having jurisdiction
23 of the action, shall have plenary power throughout the area in
24 which the contested primary election was conducted to make, issue
25 and enforce all necessary orders, rules, processes and decrees

1 according to the course of practice in all civil cases and for a
2 full and proper understanding and final determination and also
3 enforcement of the decision in each and every case. Also the
4 election code specifically says that the only exclusive remedy on
5 the election code is a new election under 21-2-527(d). That's the
6 state law that we're operating under, Your Honor.

7 The federal law which also gives authority and power to
8 the Court to do this remedy is 3 U.S.C. Section 2. And Professor
9 Eastman is going to speak and opine upon that. And, Mr. Eastman,
10 if you would like to jump in here since we're on this argument at
11 this point in time.

12 MR. EASTMAN: Sure, Your Honor. Thank you very much.
13 Let me back up for just a moment. Because one of the things that
14 the defendant alleges in their opposition papers yesterday is that
15 certification can't be undone at all. That -- that would make the
16 whole contest statute meaningless, and there's lots of provisions
17 in the state code that allow for a revisiting of the certification
18 once the contest has been done. Our issue here --

19 THE COURT: As a matter -- excuse me, Mr. Eastman. As a
20 matter of fact the General Assembly in its infinite wisdom did
21 provide for a remedy for delaying the certification of electors.
22 And it's contained in Code Section 21-2-499(b). And after it
23 basically sets the deadlines for the Secretary of State to certify
24 the election and the Governor to certify the slate of presidential
25 electors, the general assembly provided as follows:

1 Notwithstanding the deadline specified in this code
2 section, such times may be altered for just cause by an order of a
3 judge of a superior court of this state.

4 Did plaintiff seek a delay of either of those deadlines
5 from a judge of the Superior Court of Georgia?

6 MR. EASTMAN: No, Your Honor, but those were before the
7 certification and before the tally is even known. The fact that
8 the contest statute allows us to file a challenge to the
9 certification within five days after the certification is entered,
10 would become meaningless if that certification was as defendants
11 alleged, something that can't be undone. The fact of the matter
12 is the whole point of the contest election is to undo it if it --
13 if it was illegally entered as we allege it is.

14 And the fact that we have a number of -- of statutory
15 provisions that simply were not complied with in the conduct of
16 the election -- and I'll go back now to the federal issue. The
17 Supreme Court in Bush v. Gore and this is the majority opinion,
18 the per curiam majority opinion acknowledges that when the
19 Legislature has decided to allow for a popular vote to choose the
20 elections, the right to vote is fundamental, but it's very
21 important the caveat it puts on that, as the Legislature has
22 prescribed. Our argument here is that this did not occur as the
23 Legislature prescribed. It didn't do it on the front end with the
24 violations that occurred in the state statutes during the
25 election, and it didn't occur on the back end with -- with the

1 contest not being -- not being timely considered.

2 I know you disagree with Mr. Hilbert on whether that was
3 the Court's fault or decision or whether our fault, but if we get
4 over that hurdle on the merits the fact that that wasn't done
5 means that that certification remained contingent and can be
6 changed. And it is certainly within the power under 3 United
7 States Code Section 2, that means the election wasn't concluded.
8 It had failed to choose electors in a lawful manner as prescribed
9 by the Legislature on the date assigned by Congress. And that
10 means under Section 2, the power is to void that statute.

11 And I think the Seventh Circuit's decision here that we
12 cite in the brief but -- but is very telling. The Seventh Circuit
13 ultimately ruled against the Trump campaign on -- on laches
14 grounds, but held if it wasn't for that problem -- and by the way
15 that issue is pending in the Supreme Court on a sur-petition right
16 now. The 7th Circuit specifically held if it wasn't because of
17 that, the proper remedy for the Court would be to void the
18 certification and leave it up to the Legislature to decide what
19 further action to take. And that's precisely what we've asked
20 here. And it's not unprecedented.

21 We cite in our brief a couple of -- of Georgia cases
22 that deal with the issue of changing or challenging the
23 certification or requiring it to be redone after -- after the
24 certification is issued.

25 THE COURT: You're talking -- wait a second. You're

1 talking about the certification of the election. I'm talking
2 about the certification of the presidential electors, the slate
3 of -- that's been submitted to the electoral college. None of
4 those cases say that a federal judge has the authority once the
5 state certifies its slate of presidential electors in accordance
6 with state law, the electoral college has met and chosen the
7 victor of the presidential race, at that point none of those cases
8 say that a federal court has the authority to basically stand in
9 the shoes of the Congress of the United States and start saying
10 that, well, I don't care what the electoral college did, I'm going
11 to say that Georgia's votes, -- Georgia's votes don't count,
12 Georgia electors that have been certified and that have gone
13 through the electoral college process that that is undone. None
14 of those cases come close to saying that. You're using
15 electoral -- you're using cases where -- where election contests
16 were made, where challenges were made to the certification of the
17 votes to try to extrapolate that into saying that a district court
18 somehow has a coextensive authority with the Congress of the
19 United States to throw out a slate of electors after the vote's
20 been done. It's over. The electoral college has met. You think
21 that's not unprecedented.

22 MR. EASTMAN: Well, Your Honor, two things: One,
23 let's -- let's take it at its -- at its bare minimum. If there
24 was conceded violations of state law that resulted in an election
25 that was illegally entered and that the results of that election

1 were then certified improperly, and the certification was in
2 error, and the election contest is not done by December 14th when
3 the electors meet and vote, what you're saying is that there is no
4 authority for the state to correct its own illegal certification
5 because once those electors vote and cast and send that letter of
6 certification to the Congress, there is nothing the state, the
7 federal courts or anybody can do. I think that's contrary to
8 what -- the one example we have in -- in the last 150 years when
9 electors in Hawaii voted for President -- Vice President Nixon in
10 1960, and those certifications were entered. There was a court
11 order to hold a recount. At the end of that recount they
12 determined that in fact Senator Kennedy had won the election and
13 another certificate was entered by the newly elected governor of
14 that state and that one was sent to Washington as well. But that
15 one was triggered by a court action ordering a recount after the
16 certification had been entered. I do think that provides a
17 precedential authority and to hold otherwise would mean that there
18 is absolutely no way to correct the illegal certification. And if
19 that's the only one before Congress, some have argued that
20 Congress has no authority to refuse to accept it. That means a
21 blatantly illegal -- we have to assume for this purposes that the
22 certification was improperly entered. That means an illegal
23 certification would result in illegal electoral votes being
24 counted in Congress with nobody being able to do anything, and
25 that renders void the statutory mechanism for challenging. I

1 don't think that can possibly be the right answer. It's certainly
2 not the answer we saw in Hawaii in 1960.

3 MR. HILBERT: Your Honor, I would like to add to that --
4 that. Under Georgia law as well, if the slate is decertified, the
5 general Legislature -- the General Assembly of Georgia can meet
6 and vote upon a new slate. That is a remedy. The court doesn't
7 have to order that. That can be done on its own when they come
8 back into session, and it just so happens that they will be back
9 in session or they are in session through January 11, is my
10 understanding.

11 So what Mr. Eastman or Professor Eastman has just said
12 we're essentially putting the imprimatur on an illegal certified
13 election, an illegally certified elector slate, and then Congress
14 then is going to say, okay, we're going to turn a blind eye to
15 this and we're going to put imprimatur that it was okay for all of
16 these illegal votes in Georgia to be counted and this electoral
17 slate to be tendered, opened and counted and that becomes somehow
18 a true and accurate representation of the voters of Georgia. It
19 simply is not.

20 The general assembly of Georgia, their duty -- they
21 elected representatives of all of the voters of Georgia, all of
22 the citizens of Georgia. Give them the opportunity to vote on
23 this issue and make it accurate. Let them look into the illegally
24 counted votes. We have just in four categories out of 39 alone,
25 to show that there are 20 -- in excess of 24,000 illegal votes

1 counted. The disparity is only 11,779. It's less than point one
2 percent difference.

3 So from my perspective, you know, the defendants have
4 argued disenfranchising millions of voters in Georgia. No, I
5 disagree with that statement entirely. The voters in Georgia,
6 they have voted for their elected officials. There is a remedy
7 for them to step into their shoes and vote on their behalf to
8 create and have a proper certified electoral slate that is not
9 corrupted by illegal votes or an illegal constitutional settlement
10 contract. I don't think this is extraordinary relief. I don't
11 think it's extraordinary to say, General Assembly, you have the
12 power to do this, the constitution allows it, go and do it. I
13 don't see how that's extraordinary. It's already in the law.
14 We're just asking for the law to be applied.

15 MR. EASTMAN: If I may, Your Honor, let me run through
16 real quickly some of the other points in their opposition brief
17 last night.

18 The question of standing, they rely on the Bognet case
19 out of the Third Circuit, but the Eighth Circuit's case in Carson
20 and the Seventh Circuit case in Trump versus Wisconsin Election
21 Commission holds exactly the opposite. That the candidate is
22 different than private parties. And so the three cases they cite,
23 Lance and Dillard and Wood all involve private parties. And so
24 don't -- don't control on standing questions for candidates. I
25 think the second -- Seventh Circuit's analysis is particularly out

1 there on the standing question.

2 On the mootness question, they say that they can't
3 decertify without running afoul of Bush v. Gore. But what was at
4 issue in Bush v. Gore, was a state court altering the state
5 election scheme in order to decertify what had been done in
6 compliance with state law.

7 Here we were asking for decertification because the
8 state law was not complied with. And I think that makes a very
9 important distinction.

10 On the laches question, the question pending before the
11 Supreme Court of the United States right now on the laches
12 question, is whether laches can ever prevent a federal court from
13 getting or a state court, Supreme Court in those two sur-petitions
14 out of Wisconsin from getting to the merits of a federal
15 constitutional issue. And I think this is one of the major flaws
16 throughout their brief. They keep saying it's only state law.

17 The Supreme Court made very clear -- well, Chief Justice
18 Rehnquist in his concurring opinion which most think is the
19 accurate description of the law, that when the state legislature
20 has decided the manner for choosing presidential electors and they
21 do that by enacting state law, those state laws take on an
22 independent authority as a matter of federal constitutional law.
23 And that's why we get the Bush v. Gore case in the first place.
24 It raised a federal constitutional question about whether the
25 state laws that had been adopted to pursue their federal authority

1 on choosing presidential electors, were actually being complied
2 with. And then I'll touch on the Eleventh Amendment issue as well
3 because it centers on that as well.

4 The Eleventh amendment Ex Parte Young exception is
5 when -- and they're right about this, if we're only challenging
6 state law but because the state law has an independent authority
7 under federal law, Ex Parte Young exception applies here. And the
8 same is true on the abstention doctrines because we're dealing
9 with a question of federal law, how that state law which
10 implements federal constitutional authority and, therefore, raises
11 federal constitutional issues, is being applied and the abstention
12 doctrines there are not relevant.

13 I think I've touched on all of the additional points
14 they raised. I'd be happy to answer any questions you might have
15 about any of that.

16 THE COURT: Thank you, Mr. Eastman. Anything further,
17 Mr. Hilbert?

18 MR. HILBERT: The only thing I would reference and then
19 I will abdicate here, is the Purcell doctrine that was cited by
20 the defendants in their brief. Mr. Eastman can certainly talk
21 about that a little bit more, but I want to let the Court know
22 that we believe the citation of the Purcell doctrine actually may
23 be an admission by the defendants that the illegal settlement
24 agreement actually altered Georgia's Election Code.

25 The settlement agreement did not make new law as the

1 defendants claim and invalidate -- had no effect on Georgia's
2 election rules and Purcell doesn't apply at all.

3 THE COURT: All right. Thank you. Before I go to the
4 defense, let me check with the court reporter who has been
5 diligently taking all this down.

6 (A discussion is held off record.)

7 THE COURT: Okay, thank you very much. Let me hear from
8 defendants.

9 MR. WILLARD: Thank you, Your Honor.

10 Plaintiff threw a Hail Mary illegal pass here at the
11 thirteenth hour. The problem with his Hail Mary pass is that the
12 quarterback is alone on the field. The fans have gone home, the
13 marching bands have gone home, even his own team has gone home,
14 and the plaintiff continues to think that he has some viable path
15 forward to victory despite the fact that the popular vote is in,
16 counted, the electoral votes have been cast and all that is left
17 now is for Congress to count the votes.

18 Before I get into the legal arguments that we raise in
19 our brief, I just want to speak for the record. There has been a
20 lot of regurgitation today by plaintiff's counsel of the phrase
21 invalid certification, illegal votes. When you actually look at
22 their evidence, Your Honor, which the state court will do on
23 Friday, you will see how specious their arguments are, and how
24 factually unsupported their arguments are. And you can see that
25 in their inclusion in the federal court pleadings of all their

1 state court pleadings. They are throwing the equivalent of crap
2 up against the wall just hoping that some of it will stick and
3 convince someone, whether it's a member of Congress who believes
4 they have the ability to ignore their oath of office to consider
5 how the electorate has voted and how the electors have cast their
6 votes or whether they just want to continue to hoodwink the public
7 and -- or certain members of the public and continue to contribute
8 to legal defense funds and other things.

9 The fact of the matter is, the Secretary of State and
10 the governor acted pursuant to state law. The certification of
11 the election was valid. The certification of the ascertaining of
12 the presidential electors by the governor was valid, and it
13 reflects the express will of the Georgia people that have been
14 validated through three counts of the popular vote in the State of
15 Georgia.

16 Before we even get to the merits of the plaintiff's
17 complaint, though, you have the jurisdictional issues that have to
18 be overcome by the plaintiffs which they have woefully failed to
19 overcome.

20 The Eleventh Circuit in the recent Wood decision
21 established and reiterated that federal courts are not proper
22 venues for postelection contests about vote counting and alleged
23 violation of state law by state officials. One component of that
24 federal restraint is an examination of Article III standing.
25 Plaintiff's argument today completely ignores their lack of

1 Article III standing. It is plaintiff's burden to establish that
2 there has been an jury in fact, that is (audio disruption) and is
3 likely to be redressed by any court order. And the crux of
4 plaintiff's complaint is they're asserting a violation of the
5 electors clause in certifying the election results and the
6 certificate of ascertainment, and a violation of the due process
7 clause by certifying while the contest was pending.

8 I believe as the Court has recognized, there is
9 significant doubt as to the whether the plaintiff's election
10 contest was actually pending at the time due to the failure to pay
11 the requisite fees on the Friday before the certification was
12 made. That's the equivalent of saying that a complaint was
13 pending because you wrote it, you stuck it in your car, you drove
14 it to the courthouse and even though you forgot to walk it in and
15 get it filed, it was still pending.

16 As we argue in our brief, the plaintiff lacks the
17 standing to assert a claim under the electors clause. The
18 plaintiff cannot stand instead of the General Assembly for any
19 alleged usurpation of the state lawmaking process. It failed to
20 address how they have any standing to assert a violation of the
21 elector clause under any of the applicable circuit court decisions
22 that have addressed that, including the Wood decision by the
23 Eleventh Circuit.

24 Plaintiff also lacks standing to assert a due process
25 claim. They make unsupported allegations of illegal votes being

1 counted, counting officials which is risible based upon the anemic
2 proof by the plaintiffs, and it is not traceable to any of the
3 state defendants.

4 The defendants were under a federal and state statutory
5 imperative to certify the results of the election due to the
6 failure of any party, including the plaintiff, to invoke the state
7 procedure that might have delayed the certification process for
8 presidential electors. Even ignoring their lack of Article III
9 standing to bring these claims, the plaintiff's claims are moot.
10 We have litigated a number of cases over the intervening two
11 months since the November 3rd election.

12 In all of those cases, we have had a constantly shifting
13 example of what is the real imperative date from the plaintiffs,
14 including this plaintiff and his affiliated entity. First it was
15 December 8th. We've got to have everything done by December 8th
16 to invoke -- everything that has to be done, courts have got to
17 rule. Then it was the date that the presidential electors cast
18 their ballot. Everything has to be in, everything has to be done
19 by that. Now it's January 6th when Congress will open and
20 tabulate the already cast electoral votes. One can just imagine
21 as plaintiff continues to claw with the fingernails to this fix
22 that he can somehow overturn the vote of the Georgia population
23 and the popular vote in all 50 states, plus the District of
24 Columbia, then next we're going to hear, I'm still in office
25 through January 20th. January 20th is the operative date. I

1 don't care what Congress has certified. I don't care what
2 Congress has tabulated. I can still assert claims.

3 There is no case (audio disruption) anymore. As the
4 Eleventh Circuit has held, federal courts are powerless to turn
5 back the clock to a time precertification. It's just not
6 cognizable under either state or federal law to somehow ignore
7 what has already been done thus far. And that is, there is
8 a -- there is an envelope sitting in the archives of the United
9 States that contains Georgia's cast electoral votes. The only
10 thing left to do is tomorrow for Congress to discharge additional
11 obligation. There's not a thing this court or any Georgia court
12 can do to undo that completed act.

13 In addition to the plaintiff's claims being moot,
14 plaintiff's claim are barred by the laches doctrine. As the court
15 has already pointed out, the settlement agreement was entered into
16 not just by the Secretary of State, but the state election board
17 on March 6th. Plaintiff did nothing at that time to challenge the
18 settlement agreement, nor did any of the other parties who post
19 November 3rd have raised challenges to that settlement agreement.
20 That settlement agreement was entered into pursuant to the lawful
21 delegation of authority from the General Assembly to the state
22 election board. The state election board pursuant to that
23 delegated authority, entered into an agreement designed to ensure
24 as the General Assembly has changed them, with the uniform
25 application of election law throughout the state. That is exactly

1 what the settlement agreement contemplated and reiterated. And
2 the settlement agreement actually references the fact that a
3 proponent of the settlement agreement was the February adoption by
4 the state election board of the state election board rule. At no
5 point in time has the plaintiff brought a declaratory judgment
6 action challenging the SEB's promulgation of its rule, nor has he
7 challenged the application of the settlement agreement prior to
8 the November 3rd general election.

9 The Fifth Circuit, before the circuit split, so its
10 analysis still holds true in the 1973 Tony decision, what you have
11 is a plaintiff who either is manufacturing a constitutional
12 violation now or was perfectly aware of a constitutional violation
13 at the time that it occurred, but was hoping to benefit from that
14 constitutional violation and so sat on his hands until it became
15 apparent that he was not benefiting from that. And in neither
16 instance is it appropriate for a federal court to now come in
17 postelection and reward plaintiff for sitting on his hands.

18 The delay in this case by plaintiff is inexcusable. We
19 had a November 3rd election. We had a November 20th
20 certification. Pursuant to the unsupported chatter out there
21 raised by the plaintiff and his supporters, the Secretary of State
22 ordered an unprecedented hand manual tabulation of the election
23 results. Those, once again, confirm that the plaintiff had lost
24 the election. Then pursuant to his statutory right, the plaintiff
25 asked for a recount. That third tabulation of the votes once

1 again confirmed that the plaintiff had lost the State of Georgia.
2 At no time until the expiration of five days from or the December
3 7th certification, at that point the plaintiff suddenly decided
4 I'm going to bring an election challenge. I'm not going to invoke
5 the specific procedures to delay the certification of the
6 presidential election or the certificate of ascertainment that
7 would go to the archivist of the United States, I'm just going to
8 file a garden variety election challenge and then through my own
9 inaction as well as some improvident decisions that I make in the
10 litigation context, I'm going to allow my case to compost in the
11 Fulton Superior Court.

12 As the Georgia Supreme Court has admonished election
13 contestants time and time again, most recently in the Cook
14 decision, just because the General Assembly has given you a
15 temporal window through which you can theoretically assert your
16 claims, does not mean that you can fully utilize that temporal
17 window if there will be some intervening act that occurs before
18 the judicial process can stay out.

19 In the Cook case there is a statutory right that you can
20 file appeal from an election contest ten days after the decision,
21 and what the plaintiff in that case did or what the appellant in
22 that case did was wait until the full ten days before filing their
23 appeal to the Georgia Supreme Court. In the interim, you had the
24 certification of the results and you had the person, I believe,
25 take office. And what the Georgia Supreme Court says is just

1 because the General Assembly has given you ten days, doesn't mean
2 that you can sit on your hands like the plaintiff has in this case
3 and wait for that full temporal period to elapse. You've got to
4 move with expeditious discretion. And the plaintiff here has at
5 every turn failed to move expeditiously.

6 If one were so inclined, one could read it as they don't
7 want a decision on the merits in the state court. They want to
8 have the specter of uncertainty out there for their supporters and
9 Congress tomorrow because they know once a court examines their
10 complaint, a court will determine that it is specious.

11 Plaintiff's claims are also barred by the Eleventh
12 Amendment. The relief against the state acts or is limited to
13 perspective injunctive relief under Ex Parte Young. What
14 plaintiff wants to do here is to seek a remedy for something that
15 has occurred in the past and seek retrospective relief regarding
16 the decision of the secretary to certify the election results and
17 the decision by the governor to issue the certificate of
18 ascertainment to the archivist of the United States. It is
19 improper for a federal court to consider the relief proposed by
20 the plaintiffs to undo those completed acts.

21 At this point in time the role of the Secretary of State
22 and the governor in the presidential electoral process is the same
23 as it is for any other member of the Georgia electorate. And if
24 they so choose, watch the outcome in Congress tomorrow of the
25 tabulation of the electoral votes. There is no further action

1 that can be restrained on the part of either the governor or the
2 Secretary of State. And the request by the plaintiffs to create a
3 process through judicial fiat that would set aside the statutorily
4 enacted process by the General Assembly, the General Assembly has
5 decided we're going to allow the people of Georgia to vote, once
6 those results have been certified and that certification has been
7 transmitted to the governor, then we are going to delegate to the
8 governor the authority and the duty to transmit that certificate
9 of ascertainment to the archivist of the United States. One week
10 later, we are going to delegate to the certified slate of
11 presidential electors to gather, as they do in all 50 states and
12 the District of Columbia, and cast their electoral votes for
13 president. At which point they're going to be sealed in an
14 envelope and sent up for Congress to tabulate. There is nothing
15 to enjoin for the secretary or the governor, nor can any mandatory
16 injunction issue to force them to, in effect, put White-Out on the
17 votes of the people of Georgia and live in this world of fiction
18 where the plaintiff prevails in the State of Georgia.

19 Even assuming that all the jurisdictional issues by the
20 plaintiffs could be overcome, which they have woefully failed to
21 address or much less set aside, there are core principles of
22 federalism at play here that caution against this Court inserting
23 itself into the electoral process and setting aside the
24 statutorily mandated process that the General Assembly has
25 adopted.

1 THE COURT: Well, as a matter of fact, I mean the -- the
2 Eleventh Circuit or certainly the Fourth or Fifth Circuit of which
3 I'm bound by that precedent, has basically instructed me that I'm
4 not to insert myself into a state election contest where the
5 challenge is based on the misapplication of state law,
6 unless -- unless there can be some federal constitutional
7 violation. And what -- I mean, what their -- what the plaintiff
8 is saying in this case is that they're alleging there was fraud
9 committed under state law. This isn't a federal claim. I mean,
10 it's a state claim that belongs in state court under a state
11 election contest challenge, and the -- the way in which plaintiff
12 is trying to make this now a federal issue, is that, goodness,
13 Congress is going to meet tomorrow and we've got to do something
14 about this. But, you know, as I've already talked about, that
15 remedy lies with Congress, period. I mean, there's a federal
16 statute at this point. There's a single remedy to not count the
17 properly-certified electoral votes of the State of Georgia, and
18 that's if Congress goes through that procedure and federal law,
19 they're objections made, they debate those objections, and then
20 Congress votes pursuant to that federal statute not to accept
21 those electoral votes. That's it. I mean, that's the only thing
22 left right now.

23 So I mean, one of the problems that I've got, obviously,
24 is, you know, we get a lot of cases removed from federal
25 court -- I'm sorry, from state court a lot of times, some of which

1 I would -- I would argue we need to change the dollar amount for
2 minimum jurisdiction a little higher because I'm getting tired of
3 dealing with auto accident cases, but that's another issue for
4 another day. But -- but not to make light of it, I mean, this is,
5 basically, kind of like a removal. I mean, what they're trying to
6 do is to remove an election contest case to me to decide today
7 that, oh, my gosh, you know, there was all this fraud issued in
8 the Georgia election and we need to just turn the clock back.
9 And, you know, I just -- it's -- you know, I keep using the word
10 unprecedented, but it's -- it's -- it's even beyond that.
11 It's -- at some point in the law there is finalization, whether
12 we're dealing with elections, whether we're dealing with other
13 things. And as long as there is an opportunity for a party to
14 challenge actions that the state has made or is going to make, due
15 process is satisfied.

16 Georgia provides multiple ways in which parties cannot
17 only contest elections, but in the presidential context, can
18 actually go to a court in Georgia to delay the certification. I
19 mean, so there are these options that the state through its
20 legislature provided to folks like the plaintiff who decided for
21 whatever reason and, again, you know, it's -- it's not up to me to
22 criticize legal strategy. Lawyers have strategies and you pick
23 one way to go and it sometimes doesn't work out and we've all been
24 there before, but there's a -- there's something that happens when
25 you pick that way and you don't pick another way, you've got to

1 live with the consequences. And I think the problem that
2 plaintiffs have -- that plaintiff has here, is that plaintiff just
3 can't live with the consequences and there are other legal options
4 that were not taken. And, again, you know, plaintiff I'm sure
5 went on advice of counsel and I understand that, but
6 there's -- that comes with -- with, you know, some final -- final
7 decisions that are made that you then can't reverse. And that's
8 just the way things are. And it's hard to accept sometimes, I
9 understand that. But the truth of the matter is, the Secretary of
10 State did his duty here with respect to the certification of the
11 elections, and I understand there is still an ongoing election
12 contest going on and that's going to continue on through at least
13 this week. And the governor did his duty in terms of certifying
14 the electors of the State of Georgia. There was nothing done to
15 prevent that happening. And something could have been done.
16 Georgia gave plaintiff and others the opportunity to delay that
17 and they chose not to do it and that's the choice, but they've got
18 to live with the choice. And, you know, the answer to this case
19 is not that, well, mea culpa, we could have done all of this, we
20 didn't do it, now federal judge, go ahead and stop -- go ahead and
21 act like Congress and just stop the count. Stop the count of the
22 electoral votes. And, you know, this is one judge that is not
23 going to do that. Because I took an oath, and the oath was not to
24 put myself in another branch of government. It was to decide
25 cases that are brought before me in accordance with the law. And

1 what plaintiff is asking me to do, quite frankly, would be
2 something that I think in another context would be criticized for
3 a judge going way beyond what a judge's duty and oath are. So...

4 MR. HILBERT: Your Honor, may I respond to Mr. Willard?

5 THE COURT: I'm going to give you a chance to rebut but
6 I'll going to give Mr. Willard an opportunity to finish.

7 MR. WILLARD: Thank you, Your Honor, and I will try to
8 keep it brief summing up what I have, and then I think Mr.
9 Anulewicz is going to address the PI factor for why the court
10 should, likewise, to grant relief to plaintiffs on that basis.

11 But the Court has hit the nail on the head. We have
12 state law to choose and state law concerns. They are just as
13 frivolous -- frivolously asserted as any of the constitutional
14 violations under federal law. I will say that to the extent that
15 they are claiming a due process violation, that is all about how
16 their state law claims are going to be processed, I think would be
17 ludicrous in any context, especially in this context, to think
18 that a plaintiff could create delay in the state court, could
19 cause the state court to be unable to render a final decision, and
20 then to run to federal court and say, the state is violating my
21 rights because it's failing to act expeditiously in the state
22 court proceeding, but in effect that's what plaintiff has come in
23 today and is arguing before the Court, that this Court --

24 THE COURT: Actions have consequences and, again, you
25 know, they may have an argument if the State of Georgia did not

1 provide a mechanism to delay the certification of both the vote
2 and the slate of presidential electors. If there was no means by
3 which to do that, I mean, I don't know, they may have had a due
4 process argument that they were locked out of being able to do
5 that while they were pursuing their election challenge, but the
6 State of Georgia provides that. I mean, clearly they could have
7 gone to either the superior court or -- they could have filed the
8 election challenge, of course, the day after the original
9 certification and then they could have asked that judge right then
10 and there we have an election challenge, please issue an order
11 keeping the governor, for example, from certifying the slate of
12 presidential electors under 21-2-499(b) and that was not done.
13 And again it's a choice. People make choices and there are
14 consequences to the choices, and you can't just make those choices
15 and decide, you know, with 24 hours or less to go to come -- run
16 over to federal court and think the federal court is going to bail
17 you out of the consequences of your choices. And that's the
18 position that the plaintiff has put this Court in and, you know,
19 it's -- it's -- you know, I've said what my concerns are about it.
20 So I'm not going to beat a dead horse.

21 MR. WILLARD: Well, Your Honor, and I will sum up for
22 exactly what you have pointed out and what we have submitted in
23 our brief, that is why abstention even (audio disruption) they did
24 not have lack of (audio disruption) if these claims weren't moot,
25 if they are barred by laches, if their claims are not barred by

1 the Eleventh Amendment, then this Court should exercise abstention
2 whether it's under general federalism principles, whether it is
3 under the Pullman doctrine or whether it is under the Colorado
4 River doctrine to allow the state court proceeding to carry
5 forward to its ultimate conclusion now that the plaintiffs have
6 finally stopped shooting themselves in the foot, gotten out of the
7 way and allowed for the continuation of the state automatic court
8 proceeding.

9 And with that, Your Honor, I'll turn it -- if you have
10 no further questions, I'll turn it over to Mr. Anulewicz.

11 MR. ANULEWICZ: And Judge, I'll be very brief. I think
12 it has been pointed that in Article 2, Section 1, Clause 2, the
13 Constitution says that the state Legislature will pick the banner
14 in which electors are chosen. Georgia has vested that in the
15 citizens of the State of Georgia under 21.210. And it says that
16 electors will be chosen by the people of this state. In other
17 places in the statute the Georgia General Assembly explicitly sets
18 deadlines for which the governor and the Secretary of State will
19 certify those votes and transmit them to the federal government.
20 The reason why they set those deadlines are they want to make sure
21 that the votes of Georgia are cast and that they are considered
22 when the Congress takes these issues up. And that's why the
23 deadlines are there.

24 And very few parts of the election code specifically
25 reference the vice president and the presidential elections but

1 499B does. And it says that if you want to stop that
2 certification which we need in order to have our votes counted in
3 Congress, you have to get an order of the Superior Court prior to
4 the certification. And that didn't happen. And because that
5 didn't happen, you cannot undo the certifications. I disagree
6 with my friend Mr. Eastman who suggested that the certification
7 can be undone. No, that is what the Legislature said and it's the
8 only way to do it. And if we rewrite how to do that now, then we
9 certainly do run afoul of Bush v. Gore.

10 On the preliminary injunction factors, I mean, obviously
11 we think that there is not a substantial likelihood of success on
12 the merits of any claims. We set that forth in our brief. We
13 submitted affidavits and other things to show why we believe their
14 claims are specious. And one of the factors we have to do we have
15 to weigh the equities here. And here on the one side we have
16 plaintiff who wants to basically exercise what I would consider a
17 political grab. And on the other side we have balanced that in
18 the election and fundamental rights of the citizens of the State
19 of Georgia to have their votes counted and in the State of Georgia
20 having its votes counted in Congress tomorrow. And because of
21 that, Your Honor, we believe that the preliminary injunction
22 should be denied.

23 And we thank you very much and happy to answer any
24 questions.

25 THE COURT: All right. Thank you, Mr. Anulewicz. Let

1 me just ask the court reporter one more time. I don't think we're
2 going to go much longer, but do you need a break?

3 (Whereupon a discussion is held off the record.)

4 THE COURT: Okay. Good. Thank you. Mr. Hilbert, you
5 can sum up.

6 MR. HILBERT: Thank you, Your Honor. I appreciate the
7 arguments of my colleagues here in Georgia. But to begin with,
8 Mr. Willard, like his briefing, is based on a lot of hyperbole but
9 no facts. Our facts are unrebutted in this case. His affidavits
10 that he submitted are basically legal conclusions, they're not
11 actual evidence. We have affidavits from actual irregularities,
12 misconduct or fraud, which is the legal standard sufficient to
13 change the outcome. To use his own analogy if the quarterback is
14 alone, the referees in this case never even took the field.
15 That's what we're talking about here. The Secretary of State and
16 the governor are violators under the Georgia Election Code.
17 Balance of the equities here, Your Honor, the imprimatur of --

18 THE COURT: I want to use that analogy. I think
19 actually what's happening here is I'm at a cross sports. It's
20 kind of like plaintiff is -- is on a football field and there are
21 -- there are referees, there are officials that decide how the law
22 gets violated or how the rules get violated and what the -- what
23 the plaintiff wants to do is go into the baseball stadium and get
24 with the umpires and basically say, hey, go ahead and change what
25 those referees have done in the football field. I mean, the

1 football field is the state where the election contest was filed,
2 the baseball field is where I am. So I think, you know,
3 that's -- that's the problem you've got. And -- and -- let me
4 just finish.

5 And Mr. Hilbert, you do a very good argument on behalf
6 of your client. I hope he's paying you well, but you can tell him
7 on my account he needs to pay you even more.

8 But anyway, I think the problem you've got is that once
9 again, there are choices that you make in contesting elections
10 that you have to live with. And I think the bottom line of your
11 argument here is no, Judge, we don't have to live with any of our
12 choices because at the end of the day we always have the ability
13 to bop on over to federal court and have a federal judge throw the
14 whole thing out. And that is just not the way the law operates.
15 The law doesn't operate that way. The law gives you options in
16 which to challenge an election, it's done at the state level.
17 There are other things you could have done which would have
18 delayed the certification of the presidential electors here. You
19 didn't take that option. And you have to live with the
20 consequences. And it's not an answer to basically say, Judge,
21 you've got all encompassing power here, you can -- you can do this
22 whenever we show up. And that's actually not the case.

23 MR. HILBERT: I appreciate that, Your Honor. I want to
24 highlight one last code section under the state code which I think
25 was also violated by the lower court here. O.C.G.A. 21-2-525

1 specifically says within 20 days after the return date fixed in
2 the notice as provided in subsection A of Code Section 21-2-524 to
3 the defendant, the providing judge shall fix a place and time for
4 the hearing. That's all we're asking, Your Honor, is for a
5 hearing on the merits.

6 And if you look at all of the concessions of all of the
7 procedural deficiencies and the frivolous arguments that opposing
8 counsel are making that actually relate back under the standing
9 order of Fulton County and make no sense, and the general known
10 principle of law that you get to the merits rather than procedural
11 technicalities under Hunter versus Warner and Herringdine versus
12 Nali Equipment (phonetic), the Court, when it finally appointed a
13 judge it was December -- December 30th, that is after the 20 day
14 period that is specifically required under the state election
15 code. So we have been -- our due process rights have been
16 violated under that code when we filed a notice of the election
17 contest, regardless of whether we could have done this before, we
18 could have, you know, challenged it or appealed it or the
19 certification process or whatever. The moment we filed our notice
20 of an election contest, there had to be a hearing in 20 days.
21 There was not one set because the presiding judge had not even
22 been appointed.

23 THE COURT: Well, because you decided to file a notice
24 of appeal of a procedural order that the odds of you getting that
25 reversed by the Supreme Court of Georgia, let's be honest, were

1 slim and none. And you did what you could have done and that was,
2 well, at least let me try to get an expedited ruling from the
3 Supreme Court, which you got within 24 hours, and it was thumbs
4 down. And then you decided at that point, well, rather than go
5 back to Superior Court, withdraw your notice of appeal, because
6 the handwriting was on the wall by then, you decided to just let
7 it sit. And you know, you have to live with those consequences,
8 Mr. Hilbert.

9 MR. HILBERT: So I appreciate that, Your Honor. I want
10 to also say with regard to the balancing of the equities, I think
11 that the Court needs to really seriously consider this precedent
12 that's being set here. Because is it not a greater harm for a
13 court to allow an illegal certification to occur, than, you know,
14 alleged disenfranchisement of alleged, you know, voters of Georgia
15 based upon the federal (audio disruption) take place tomorrow. I
16 just don't see how it's conceivable that a court can say -- just
17 turn a blind eye and say well, we're not going to look at those
18 because there were procedural mishaps or that you could have
19 gone -- you could have done something earlier.

20 THE COURT: Well, the two -- the two people you've sued
21 here and there are only two people, you sued the Secretary of
22 State and the governor, they did the duty that was required upon
23 them under law. Now, to the extent that you've got a beef with
24 local election officials which you've named, by the way, in your
25 election contest, they're not before me today. They're before the

1 Superior Court of Fulton County. You think they screwed up and
2 they committed -- they oversaw, you know, this virulent fraud that
3 took place, that's part of the election contest. That's not
4 the -- I don't have them in front of me. The only two people I
5 have in front of me are the governor and the Secretary of State
6 and there's nothing they did that they weren't required to do by
7 law and that is -- I know you're talking about it's an illegal
8 certification but again you're presuming that you're going to
9 succeed in your election contest and that's fine but they did not
10 illegally certify this election. They certified the election
11 pursuant to Georgia law. And I understand you still have a
12 hearing going on this week before Judge Grubbs in which you'll
13 make your case that it was illegal and that's fine, but, you know,
14 those are not the people I have in front of me. I have the two
15 people in front of me that did the certification.

16 MR. HILBERT: The only thing I can say to that, Your
17 Honor, is that the two people that did the certification at least
18 one of them was the actual person who changed the law under the
19 election code under the settlement agreement. So that's my reply
20 to that.

21 THE COURT: And that's already been decided by one of my
22 colleagues. Okay. Anything else, Mr. Hilbert?

23 MR. HILBERT: Nothing further, Your Honor. Thank you.

24 THE COURT: All right. Thank you. All right the Court
25 is going to deny plaintiff's motion for expedited declaratory and

1 injunctive relief for many of the reasons that I've already
2 stated. We will get an order out today as soon as possible. I
3 just can't promise exactly when it's going to be. Obviously I
4 needed to hear your arguments until I finalize the order. So, you
5 know, I will do it as soon as -- I'm going to go right back there
6 now and start working on it, and I'll get it out today. I just
7 can't promise a time.

8 And I'll just say again for the record, the reason that
9 we're all in this situation is because, you know, plaintiff filed
10 this particular lawsuit, I think at 11:03 p.m. on New Year's Eve
11 and did not indicate in the ECF filing that the plaintiff wanted
12 to have the case heard on the weekend or during a holiday, because
13 if you did, you know, you would have had a duty judge actually
14 hear the case this weekend. But that didn't occur. You know, I
15 got the case assigned to me on Monday morning. So I acted as
16 expeditiously as I possibly could. You know, I granted
17 plaintiff's order for an expedited hearing, and that's what we're
18 having today, but we only can do what we can do. So I'm going
19 to -- like I said, I'm going to get the order out today, a written
20 order out today as fast as I can, but I wanted the parties to know
21 what the bottom line of the order was going to be.

22 Thank you. Thank everyone for participating in this,
23 and for the arguments. I really appreciate it. And without
24 further ado, the Court stands in recess.

25 (Whereupon the hearing concluded at 11:01 a.m.)

1 C E R T I F I C A T E
2

3 UNITED STATES DISTRICT COURT
4

NORTHERN DISTRICT OF GEORGIA
5

6 I do hereby certify that the foregoing pages are a true and
7 correct transcript of the proceedings taken down by me in the case
8 aforesaid.

9 This the 5th day of January, 2021.
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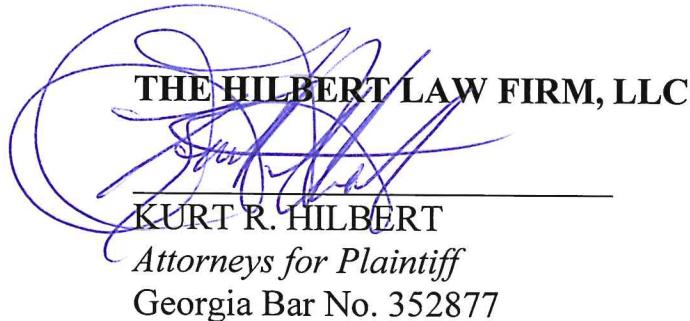
14 /s/ Viola S. Zborowski
15 VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER
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CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Georgia Civil Local Rule 7.1D, the undersigned counsel certifies that this **NOTICE OF FILING TRANSCRIPT OF MOTIONS HEARING OF JANUARY 5, 2021** was prepared in Times New Roman, 14 point font, pursuant to Local Rule 5.1C.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2021, I did cause to be sent though the Court's CM/ECF system a true and accurate copy of the foregoing Notice of Voluntary Dismissal to all parties receiving notice in this case.



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